

ML4-5 Handout – Copyright and Intellectual Property Law
[Slide numbers in square brackets]

1) [2] Intellectual Property (IP) Introduction

- a. A copyright is the _____ exclusive _____ legal right given to the creator or owner of a creative, _____ registered _____ work to print, publish, perform, film, or record literary, artistic or musical material
- b. Governing acts – 1976 Copyright Act, DMCA 1998
 - i. All Copyright cases are heard in _____ Federal _____ Court
- c. Federal power over Copyright originates from *Article I, §8, Clause 8* of the Constitution under the necessary and proper prong of the “commerce clause”
- d. [3] Copyright protects and gives ownership over the _____ expression _____ of an idea, not _____ the idea itself _____
 - i. Why are ideas not protected? _____ not tangible, no proof of “theft” _____

2) [4] Branches of IP - Trademark and Patent

- a. **Trademark - Protects** _____ words/slogans, short phrases, etc _____
 - i. Ex: _____ Nike, Nike’s swoosh, “just do it” _____
- b. Test for infringement: _____ likelihood of confusion _____
- c. **Patent - Protects** _____ designs, systems, processes, formulas _____
 - i. Divided into **design patents, utility patents and plants**
- d. Trademarks and Patents file applications with the _____ USPTO _____

3) [5] Copyright Requirements

- a. There are two elements required to receive Copyright protection
- b. **Element 1** - ____originality____
 - i. Test: Modicum of creativity
- c. While the Work itself cannot be copied, **genres, facts and themes** can be (Ex: ____war movies, romantic movies____)
- d. **Element 2** - ____fixation____
 - i. Test: Must be fixed “in a tangible medium of expression”
- e. Do you **own** a © once you have done these two things?
 __Yes__
- f. Why do we **register** with the © office? Unless the work is registered with the Copyright office, an owner cannot enforce or sue a third party who uses it without authorization

4) [6] Section 102 - Types of Original Works

- a. ____Literary____ Works – novel, short story, poems
- b. Audiovisual Works - __Movies, tv shows____
- c. Musical Works – divided into the **musical composition (MC)** and the **sound recording (SR)**
 - i. MC – ____lyrics, melody, notes____
 - ii. SR – ____arrangement____
- d. Dramatic Works - plays/musicals (incl. music) screenplay/pilot
- e. Pantomimes and Choreographic Works – dances
- f. Pictorial, graphic, sculptural works
- g. Architectural Works - sculptures, building designs
- h. Other - “catch all” - software, patterns, compilations

What is not protected by ©?

- i. Works that haven’t been fixed in a tangible medium of expression; ideas, themes, data, concepts, scene-a-faire, historical facts; titles/names/short phrases/symbols and designs

5) [7] Section 106 Rights

- a. Hypo: I write a script and register its Copyright. What does that allow me to do?
- b. **1 - Making ___ copies_____ (physical/digital)**
- c. **2 - Make a “derivative work” - _____ a movie from a book_____**

- d. **3 - Distribute the Work** - Make it available to the public through sale, in a process known as _____ licensing_____
- e. Types of Licenses: can be **exclusive** to one party or **non-exclusive** to multiple parties
- f. Can a Copyright owner license a Work after they have exploited it? _____ Yes_____
- g. **4 – Public Performances**
 - i. Ex: _____concerts, music screenings, etc_____
- h. **5&6 - Public display and digital audio transmission**
 - i. The unauthorized use of any of the Section 106 rights = _____infringement_____

6) [8] Copyright Ownership - Joint Authors

- a. **Joint authors** are a writing team or two or more authors working together (Ex: _____Coen brothers_____)
- b. To be a joint author, each co-author has to contribute to the work. If so, each author has an **equal and undivided interest** and all **profits are** _____shared

- c. Each author can grant a **non-exclusive license** to a third party, both authors need to consent to an exclusive license

7) [9] Copyright Ownership – WFH vs. IC

- a. Work For Hire: Author/creator is not the owner
- b. Independent Contractor: Author/creator is the owner

- c. (1) Work was developed as a “**WFH**” through the
 ___scope___ **of their**
 ___employment___ or (2) the Work is
 ___ **or commissioned** by a
 Company from a non-employee/independent contractor
 i. Effect: The ___ company___ owns the
 Work, not the employee/creator
- d. If not a WFH, the writer is an “___ independent
 contractor___”
 (**IC**), and that person owns the Work and can exploit it how
 they want

When it is unclear, a court will consider the following factors:

- Does the employer exercise ___ **control** ___ over the
 worker?
 → Does the employee own their **own**
 ___ **equipment** ___ or does the Company provide it?
 → Does the employee create their own **work schedule** or run their own
 company;
 → Method of **payment/tax treatment**? ___ **1099** ___ for IC’s,
 ___ **W2** ___ for EE’s

8) [10] Duration of Copyright Protection

Once a work is registered, Copyright owners receive protection
 for the following durations:

- i. **IC**: Life of the author + _70 years___ years
 ii. **WFH**: The shorter of: (a) _95___ years from the
 date of publication; or (b) _120___ years from the
 date of creation

b. **Droit Moral** – Moral rights of foreign authors

- i. Ex: Makers of Parasite wish to exploit the movie in the
 U.S. – do they have U.S. © protection? ___ Yes___

[11] Copyright Expiration - Once Copyright ownership expires, it
 falls into the ___ public domain___

- c. Which beloved children’s book/movie character recently fell
 into this category? ___ Winnie the
 Pooh___

9) **[12] Introduction to Copyright Infringement**

- a. Copyright infringement occurs when someone has taken a part or all of someone else's Copyright work without a _____ license _____ or _____ permission _____
- b. If you have registered a Copyright and someone is using your work without a license or permission, what should you do? Send a _____ cease _____ and _____ desist _____ letter to the infringing party
- c. Process of **notice and takedown** by informing Internet Service Provider (ISP)

10) **[13] Proving Copyright Infringement: Elements ***

In order to succeed on a © infringement cause of action, a Plaintiff must prove the following elements:

- a. **1 – The work is** _____ protected by Valid Copyright _____ (ownership)
- b. **2 – The Copyright is** _____ registered _____ with the Copyright office; AND EITHER
- c. **3A – The Defendant directly** _____ copied _____ the work; OR **3B – The Defendant had** _____ access _____ to the work and the two works are _____ substantially similar _____ to one another
- d. Why sue right away? _____ **it prevents infringing activity**
- e. Why not sue right away? _____ **Money!**

11) **[14] Examining “Substantial Similarity”**

- a. Extrinsic (Objective) Test – Court searches for the similarities in _____ plot, dialogue, tone, characters _____, involves expert testimony
- b. Intrinsic (Subjective) Test – whether an _____ average _____ person considers the works

substantially similar, which is determined by a
__jury__

12)[15] Infringement Defenses

- a. Statute of Limitations – How long do you have to file a lawsuit? __3__ years from the date they knew (or should have known) of infringement
- b. **Independent Creation** - Two or more works can __both__ receive © protection if each author can prove that: (1) the work was created **independently** and (2) neither has **copied** the other
- c. **“De Minimis”** – (1) the **amount** of the work taken is minimal AND (2) the **“observability”** of the © work is negligible
- d. What if you want to use a Copyrighted clip in your own Work?
__Ask permission, give them credit, get a license__

13)[16] The “Fair Use” Defense

- a. This defense permits the
__unlicensed__ use of Copyrighted Works in certain instances
 - i. When can you use a Work **without a license**?
__reporting, criticism, education, and parody__
- b. **Fair Use 4 Factor Test** - (1) __purpose__ of the use; (2) __nature__ of the Work; (3) __amount__ of the Work being used; and (4) __commercial__ use/effect on the market
- c. [17] **Factor 1 - Purpose and character of the use**
Considers whether the alleged Copyrighted (second) Work is
__transformative__ – has something new been created? (Ex: __Amish Paradise__ - Weird Al)

- d. Case: Harry Potter encyclopedia which put all terminology used in the films into one Work – verbatim use of text is
____NOT____ **transformative** and
_____ not fair use _____

[18] Factor 2 - Nature of the Copyrighted Work

- e. Stronger case of fair use if copied from a _published _____ work rather than unpublished work, because the author of an unpublished work should control the **first** public appearance of their expression under the ____ **1st sale doctrine** _____
- i. *Sony v. Universal City Studios, Inc.* – “Betamax” case – recording series for time shifting **is not** © infringement

[19] Factor 3 - Amount and Substantiality

- f. This factor asks ____ how much _____ of the original work was taken

[20] Factor 4 – Effect on Market/Commerciality

- g. Court considers whether the infringing party’s use deprives the copyright owner of ____ income _____ **or the effect on the** _____ future profits _____ of the Work

14)[21] Secondary Liability: Third Party Infringement

- a. Plaintiffs can also bring infringement lawsuits against Defendants who **helped promote** the infringing act, known as _____ contributory _____ **infringement**; parties who **benefit financially** from infringement might be liable for _____ vicarious _____ **infringement**
- b. Case: *MGM v. Grokster* (2005) – peer-to-peer (P2P) file sharing services could be sued for inducing © infringement when users share and download music from one another
- i. Result? ____ WEBSITES OWED 50 MILLION TO COMPANIES _____

15)[22] Remedies for Infringement

- a. Actual Damages = \$750-\$30,000 **per** _____
_____ **WORK** _____
- b. Statutory Damages = \$150,000 **per** _____ *INFRINGING*
ACT _____
- _____ Non-Monetary/Equitable remedies
- c. **Injunction** – _____ **PREVENTS FURTHER COPIES**
FROM BEING MADE/
DISTRIBUTED _____
- d. **Impoundment** – Collection/destruction of infringing copies

16)[23] Music Law

- a. Musical Composition - owned by the
_____ **SONGWRITER** _____
- b. Sound Recording - owned by the _____ **RECORD**
LABEL _____

[24/25] “Blurred Lines” Case - Marvin Gaye vs. Robin Thicke

- c. Song released in Summer 2013 by Robin Thicke and Pharrell, becomes #1 hit. Sued in CA Federal Court by Marvin Gaye’s estate for the 1976 song “Got to Give it Up”.
- d. Plaintiff (Marvin Gaye’s Estate) Argument: (1) owns ©; (2) registered ©; (3) access and _____ **SUBSTANTIAL**
SIMILARITY _____
- e. Defendant (Thicke/Pharrell) Counterargument: _____ **NOBODY**
OWNS A FEELING/GENRE _____
- f. Result? _____ **THEY LOST, OWED 5.3 MILLION AND 50% OF**
THE ROYALTIES _____

[26] Social Media and Copyright: Lizzo “Truth Hurts”

- g. Is Mina Lioness’ tweet protected by Copyright?
_____ **YES** _____
- h. Result? _____